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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-484

THE INDEPENDENT SOAP & CHEMICAL WORKERS OF KANSAS CITY, KANSAS,
Petitioner,

vs.

FLORENCE N. CUNNINGHAM, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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The Independent Soap & Chemical Workers of Kansas City, Kansas prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Kansas entered in the above entitled case on August 13, 1971, pursuant to an opinion filed July 15, 1971, after a motion for rehearing was denied on August 13, 1971.

The Opinion of the Supreme Court of Kansas is as yet unreported and appears in the Appendix filed separately herewith at pp. 1-13.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and Rule 19(a) of the Rules of the United States Supreme Court.

QUESTIONS PRESENTED

1. Whether a contract, made by and between an employer engaged in commerce within the meaning of Sections 2(6) and 2(7) of the National Labor Relations Act as amended and a union engaged in representing employees in an industry affecting commerce, may be interpreted and construed by a state court without reference to Federal Substantive Law and in conflict with Federal Substantive Law particularly by determining that a modified union security clause deprives a union of the right to expel any of its members and thereby deny to employees their rights to self organization to bargain collectively and engage in concerted activities as set forth in Section 7 of the National Labor Relations Act as amended and to take away from a union a power expressly reserved to unions by the Proviso to Section 8(b)(1)(A) of said Act, and make it possible for an employer to interfere with the internal affairs of a labor organization in violation of 8(a)(2) of said Act.

2. Whether a state court, in construing the constitution and by-laws of a union, may determine, contrary to the Decisions of the United States Supreme Court in interpreting and applying the provisions of the Labor-Management Reporting and Disclosure Act, that a union is powerless to expel strikebreakers and thereby deprive the union of the economic objective for which the union exists and thus deny to employees their rights to engage

in concerted activity for the purpose of collective bargaining or other mutual aid and protection as set forth in Section 7 of the National Labor Relations Act, and to deny to the union the right to make its own rules with regard to the acquisition and retention of membership as protected by the Proviso to Section 8(b)(1)(A) of said Act.

STATEMENT OF THE CASE

Suit was filed by the Respondents seeking reinstatement in the union after they had been expelled for strikebreaking. Trial was waived and all facts were stipulated. The stipulation is contained in the Appendix at pp. 36-43.

Respondents based their claim for relief essentially on two grounds. First, that the constitution and by-laws of the union contained no provisions at all relating to expulsion and that in their absence the union had no right to expel members. Second, the labor agreement entered into between the petitioner and the employer contained a clause allegedly which prohibited the union from expelling strikebreakers, and therefore their expulsion violated the labor agreement. (A 26)

The District Court ruled that in the absence of a clause relating to expulsion a union had no inherent right to expel members for strikebreaking. The court refused to rule on the allegation that the labor agreement barred expulsion. (A 34)

On appeal, the Supreme Court of Kansas affirmed but added as a basis for its decision that the labor agreement between the Union and the Employer prohibited expulsion of members. (A 12-13)

Petitioner called the court's attention in its brief and in its Motion For Rehearing that rulings made in the

District Court and by that court were in conflict with the Decisions of this Court and those of the National Labor Relations Board in interpreting the National Labor Relations Act of 1947 as amended, 29 U.S.C. 141 et seq., particularly Sections 157, 158(a)(1), 158(a)(2); Section 301(a) of said Act; and The Labor-Management Reporting and Disclosure Act, 29 U.S.C. Section 411(a)5. (A 13-21) The Supreme Court of Kansas without opinion overruled Petitioner's Motion for Rehearing. (A 21)

REASONS FOR GRANTING THE WRIT

1. In interpreting the labor agreement the State Court was bound to follow Federal Law as this court held in *Teamsters Union* v. *Lucas Flour,* 269 U.S. 95, but instead it created a state rule of law on the subject matter which involves a federal question of substance in a manner which is not in accord with the applicable decisions of this court.

This court has held that in construing labor agreements state courts must apply federal substantive law. *Teamsters Union* v. *Lucas Flour,* supra. The court below construed a modified union security clause[1] which read as follows:

> "III. *Union Membership & Collection of Dues.*
>
> "1. Any employee who is, or becomes, a member of the Union by signing an authorization card may at his own discretion remain a member in good standing during the life of this Agreement. In case of illness or disability or leave of absence due to lack of work dues will be waived until the employee returns to work.

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1. The State of Kansas has a Right-To-Work Law which prohibits *compulsory* union membership.

"The Employer will deduct from the second pay day each month the Union dues for the current month of an employee who voluntarily signs an authorization card, and will pay the dues promptly to the Treasurer of the Union. The authorization may be canceled by the employee in writing at any time.

"2. The Employer agrees that it will not discriminate against an employee because of membership in the Union. The Union agrees that there shall be no Union activity on the Employer's time or on the plant premises except (a) as allowed under the provisions of this Agreement, (b) when an employee not on the job confers with other employees not on jobs at times such as relief periods, lunch time, and at the start or end of their regular shifts."

In interpreting this clause the lower court was limited to an examination of the contract clause standing alone without any other evidence concerning the intent of the parties. Hence, its conclusion was a purely legal conclusion with no other factual basis for its support. The conclusion of the court is completely erroneous and establishes as a *federal* rule in Kansas that no union that has any type of voluntary union security agreement can expel its members for strikebreaking.

This ruling ignores the holdings of the National Labor Relations Board that an employer has no right to attempt to intrude upon a union's right to discipline members which right is specifically reserved to the Union under Section 8(b)(1)(A) of the Act. *Independent Stove Co. v. Chauffeurs International Union*, 175 NLRB No. 25. An insistence by the employer of such a clause would constitute a violation of Section 8(a)(5) of the National Labor Relations Act. *UOP Norplex Division of Universal Oil Products*, 179 NLRB No. 111. See also, *Scofield* v. *NLRB*, 393 U.S. 995.

By drawing such a legal conclusion from the most tenuous of inferences, the Kansas Supreme Court deprived the union of its inherent right to discipline its members which this court held the Union to possess in *NLRB* v. *Allis-Chalmers*, 388 U.S. 175, and *Boilermakers* v. *Hardeman*, 28 L.Ed.2d 10.

The construction which the lower court gave to the contract clause is completely unrealistic for on its face the clause does not even refer to a union's power to discipline its members. As a matter of federal law this court has held that strikebreaking is uniformly considered to be adequate cause for discipline. Only upon a showing by the most clear and convincing evidence should this right be deemed to have been bargained away in a contract with the employer. The lower court's opinion gave to the employer a power over internal union affairs which the National Labor Relations Board would deny it under Section 8(a)(5) of the National Labor Relations Act and permitted an invasion in the internal affairs of a union which was expressly reserved to unions by the Proviso to Section 8(b)(1)(A) of the Act.

A second reason for granting a writ is that in interpreting the constitution and by-laws the court found that the Union was powerless to determine who could become or remain members of the union specifically holding that the Union could not expel members for any reason regardless of whether or not their conduct was designed to defeat the very purpose for which the union was created.

Under Section 7 of the National Labor Relations Act employees are given the right to self organization and to bargain collectively through representatives of their own choosing. The decision of the lower court takes away that right for the reason that it compels members of a labor

organization to retain in their ranks persons who have expressly attempted to thwart the union in the most fundamental way and in fact destroy it as an effective collective bargaining representative.

A union must possess the power to fine or suspend members since the union must be capable of regulating its most effective weapon as bargaining agent. A union without power to enforce solidarity among its members cannot be an effective instrument of collective bargaining. Therefore, there is an intimate connection between the right of a union to discipline members who cross a picket line and the right to bargain collectively, protected by Section 7 of the National Labor Relations Act, and a union's right to make its own rules with reference to acquisition or retention of membership. In fact it has been specifically held by at least one State Supreme Court that a State Court is totally without jurisdiction to impinge upon those rights on the grounds of federal preemption. *United Auto Workers* v. *Wisconsin Employment Relations Board*, 11 Wisc. 2d 277, Cert. Denied 365 U.S. 878.

The lower court, however, not only exercised jurisdiction which the Supreme Court of Wisconsin found not to exist, but exercised it in a manner which deprived employees of their rights protected by Section 7 and took away an authority reserved to Unions by the Proviso to 8(b)(1)(A) of the Act.

The lower court brushed aside the federal question by simply stating that "Since this is a matter of contract law it is *essentially* a matter of state law." (A 9) The court then proceeded to ignore all of the federal judicial precedents and federal statutes which spelled out rights and remedies and proceeded to render an opinion which was in conflict with the opinions of this court and which impinged upon rights protected by federal law.

The Petitioner, on the other hand, carefully followed the provisions of Section 411(a)(5) of the Labor-Management Reporting and Disclosure Act as interpreted by this court. It gave written specific notice of charges. It provided full opportunity to Respondents to prepare their defense. It gave opportunity to be heard. It then additionally submitted the question of penalty to the membership. In the middle of an election these proceedings were instituted in the state court. Had the case been brought by the Secretary of Labor under the provisions of the Labor-Management Reporting and Disclosure Act, Respondents would have been held to have been properly expelled under the Decision of this court upon which Petitioners relied in *NLRB* v. *Allis-Chalmers,* supra, and by the decision of this court in *Boilermakers* v. *Hardeman,* supra.

The lower court totally ignored the decisions of this court in said cases and established a state rule of law which took away from the employees inherent federal rights which were essential to the exercise of their power to bargain as the exclusive representative of employees for collective bargaining which rights were granted under Section 7 of the National Labor Relations Act as amended, and took away from the Petitioner those powers reserved to unions under the Proviso to Section 8(b)(1)(A) of said Act.

CONCLUSION

For the above stated reasons, particularly in view of the fact that there are contrary State Supreme Court cases such as *United Auto Workers* v. *Wisconsin Employment Relations Board,* supra, and since the matter involves vitally important federal questions, a writ should issue.

Respectfully submitted,

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